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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 251

KATZ UNDERWEAR COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 92a–97a) is reported at 39 F. Supp. 976. The opinion of the Circuit Court of Appeals (R. 155–158) is reported at 127 F. (2d) 965.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 24, 1942 (R. 158–159). The petition for writ of certiorari was filed on July 24, 1942. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Has the taxpayer, within the meaning of Section 902 of the Revenue Act of 1936, borne the burden of the tax sought to be recovered?

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.
>
> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to

which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

* * * * *

(U. S. C. 1940 ed., Title 7, Sec. 644.)

STATEMENT

This suit is for the recovery of $9,913.40, paid by the taxpayer during the years 1933 and 1934 as floor-stocks taxes under the Agricultural Adjustment Act.

The petition (R. 3a–5a) alleges the payment of the tax, that the statute under which it was collected was unconstitutional and void, that a claim for refund was duly filed and rejected and that the taxpayer had borne the entire burden of the tax.

The sole issue raised by the answer (R. 14a) is whether the taxpayer had borne the burden of the tax.

The District Court found (R. 92a–93a) there was no evidence that the taxpayer had borne the

burden of the tax and granted judgment in favor of the United States (R. 97a).

The Circuit Court of Appeals, after reviewing the evidence, held that the findings of the District Court were justified and affirmed the judgment.

ARGUMENT

Section 902 of the Revenue Act of 1936 makes the refund of any amount collected as tax under the Agricultural Adjustment Act conditional upon the claimant's establishing to the satisfaction of the trial court that the claimant bore the burden of the tax.

The issue with respect to the burden of the tax was sharply litigated upon the trial and evidence was offered by the Government (R. 66a–80a) which directly contradicted the taxpayer's evidence. The District Court held that the evidence adduced by the taxpayer was (R. 97a) "conflicting to such an extent that much of it I am unable to believe, and I cannot find any fact upon the basis of it." The District Court thus found, without going into the Government's case, that the taxpayer had failed by credible proof to make out a *prima facie* case under the statute. The principal error urged on appeal was that the trial judge misapprehended the purport of Katz's testimony (R. 156). The opinion below shows that the court reviewed this testimony in detail and concluded that the Dis-

trict Court was amply justified in refusing to accept it as credible.

But the taxpayer insists that even if the District Court was right in rejecting the testimony of Katz, the taxpayer's principal witness (R. 16a–41a, 51a–65a), as incredible, the taxpayer's remaining evidence was sufficient to make out a case and support a recovery. This argument overlooks the fact that Katz's testimony was necessary to explain the admitted increase in selling price and that the court below had already held that an unexplained price increase sufficient to cover the tax defeats recovery. *Honorbilt Products, Inc.* v. *Commissioner,* 119 F. (2d) 797 (C. C. A. 3rd).

There is no conflict with *C. B. Cones & Son Mfg. Co.* v. *United States,* 123 F. (2d) 530 (C. C. A. 7th), and *Arkwright Mills* v. *Commissioner,* 127 F. (2d) 465 (C. C. A. 4th). In the *Cones* case the Circuit Court of Appeals held that the price increase was caused by factors other than the tax. Although we think the case is doubtful, it is not applicable here because with the elimination of Katz's testimony the price increase is unexplained. The *Arkwright* case was remanded to the Processing Tax Board of Review to consider evidence which it had rejected as not pertinent. It is not in point here.

CONCLUSION

The decision of the court below is correct. There is no conflict with other decisions. There is no question of general importance presented. The petition should therefore be denied.

Respectfully submitted.

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